

82-1147

Supreme Court, U.S.
FILED

JAN 7 1983

No.

ALEXANDER L. STEVAS
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,
(AFL-CIO), and CHARLES H. PILLARD,
Petitioners,

v.

NATIONAL CONSTRUCTORS ASSOCIATION, *et al.*,
Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

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QUESTIONS PRESENTED

The court of appeals has construed a provision of a multiemployer collective bargaining agreement between an international labor organization and an employer association as requiring that all collective bargaining agreements of the international labor organization's constituent local unions include a clause calling for payment by employers into an industry fund.

The questions presented are:

(1) May such an agreement be held to be "price fixing" illegal *per se* under § 1 of the Sherman Act, notwithstanding the decisions of this Court beginning with *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, concerning the scope of *per se* rules of illegality and of the rule of reason in antitrust analysis?

(2) May such an agreement be found to be outside the labor exemption to the antitrust laws and violative of those laws (a) insofar as it applies to employers within the multiemployer bargaining unit in which it has been negotiated, or (b) insofar as it affects employers outside that unit, unless the international union was motivated by a predatory intent directed at the employers outside that unit?

PARTIES TO THIS PROCEEDING

The defendants in this action (who were appellants in the Court of Appeals), in addition to the petitioners, International Brotherhood of Electrical Workers (AFL-CIO) and its president, Charles H. Pillard, are National Electrical Contractors Association, Inc.; Robert L. Higgins; Colgan Electric, Inc.; Miller Electric Co.; H. E. Autrey, Allen L. Bader, Frank H. Bertke, Donald C. Cates, Robert W. Colgan, Joe R. Devish and Carl T. Hinote in their individual capacities and as Trustees of the National Electrical Industry Fund; Allan H. Stroupe, L. R. McCord, Aldo P. Lero and Lowell C. Timm, in their official capacities as Trustees of the National Electrical Industry Fund; and John Ostrow, C. W. Stroupe, Warren Losh and J. D. Hilburn, Sr., in their individual capacities.

The plaintiffs in this action (who were appellees in the Court of Appeals) are National Constructors Association and Commonwealth Electric Company, by and on behalf of themselves and all others similarly situated; The Howard P. Foley Company, by and on behalf of itself and all others similarly situated; Donovan Construction Company of Minnesota, Inc.; Arthur McKee & Company, Inc.; Badger America, Inc.; Catalytic, Inc.; C. F. Braun Constructors, Inc.; Dravo Corporation; Guy F. Atkinson Company; The H. K. Ferguson Company; Jacobs Constructors, Inc.; Pullman Kellogg Division of Pullman, Inc.; and Sterns-Roger, Inc.

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**PETITION FOR A WRIT OF CERTIORARI TO THE
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Petitioners, International Brotherhood of Electrical Workers ("IBEW") and the Union's president, Charles H. Pillard, respectfully pray that a writ of certiorari issue to the United States Court of Appeals for the Fourth Circuit to review that court's judgment of May 17, 1982, in *National Electrical Contractors Association et al. v. National Constructors Association, et al.*, Nos. 80-1808 and 80-1809.

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), the federation of national and international unions with which IBEW is affiliated, supports the request for a writ of certiorari. This petition, which is the joint product of IBEW and the AFL-CIO, reflects the identity of their views on the issues presented, and their desire to minimize the burdens on the Court by stating their common position only once.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 678 F.2d 492 and is reproduced at pp. 1a-23a of the separately bound Appendix to this Petition ("A."). The order of the Court of Appeals denying rehearing is reported at 689 F.2d 1199 and is reproduced at A. 24a-25a. The opinion of the United States District Court for the District of Maryland is reported at 498 F. Supp. 510 and is reproduced at A. 26a-106a. The order of the district court is unreported and is reproduced at A. 107a-108a. The injunction issued by the District Court is unreported and is reproduced at A. 109a-110a.

JURISDICTION

The judgment of the court of appeals was entered on May 17, 1982. A timely request for rehearing or rehearing *en banc* was denied on September 8, 1982. On November 24, 1982 Chief Justice Burger entered an order extending the time for filing this Petition to and including January 7, 1983. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves § 1 of the Sherman Act, 26 Stat. 209, 15 U.S.C. § 1; §§ 6, 16 and 20 of the Clayton Act, 38 Stat. 730, 15 U.S.C. §§ 17 and 26, 29 U.S.C. § 52; and §§ 8(b)(1)(B), 8(b)(3) and 8(d) of the Labor Management Relations Act of 1947, 61 Stat. 136, 29 U.S.C. §§ 158(b)(1)(B), 158(b)(3) and 158(d). These provisions are set forth in the statutory appendix to this Petition at pp. 1b-4b, *infra*.

STATEMENT OF THE CASE

A. The Factual Background

This case involves the 1976 national collective bargaining agreement between the National Electrical Contractors Association ("NECA") and the IBEW, affecting labor relations in the electrical construction industry. A

clause in that labor agreement provides that employers shall pay up to 1% of their electrical labor payrolls into a national fund. The provision was implemented by its adoption into hundreds of local collective bargaining agreements. Payments into the fund were "to be used primarily to cover NECA's 'cost of administration of labor agreements, industry advancement and services rendered to the electrical contracting industry'" (A. 32a).

The IBEW is an unincorporated international labor union, affiliated with the AFL-CIO. It has some 400 affiliated local unions in the construction industry, representing hundreds of thousands of construction workers.

NECA is an incorporated employers' association with 135 affiliated local chapters throughout the country. NECA's members regularly employ electrical construction workers under the terms of collective bargaining agreements negotiated with IBEW local unions. NECA's functions include providing training for supervisory employees (R. 100);¹ participation as the employer representative in the activities of the Joint Apprenticeship Training Program for the electrical construction industry (R. 281-2, 385-86); providing field representatives to assist in the day-to-day administration of local collective bargaining agreements (R. 270-3, 403-5); participation in the grievance settlement process on behalf of employers and participation as employer representative in the Council on Industrial Relations, a private quasi-judicial forum for settling labor management disputes in the electrical construction industry, see *Parks v. IBEW*, 314 F.2d 886, 894 (C.A. 4), *cert. denied*, 372 U.S. 976.

Collective bargaining agreements in the electrical construction industry have traditionally been negotiated on a local, multiemployer basis. In all but a few instances, the multiemployer bargaining agent has been a NECA chapter located in the jurisdiction of the contracting IBEW local union (A. 4a).

¹ "R." refers to the printed record in the court of appeals.

By reason of the nature of the construction industry, NECA chapters, like other employer associations in the construction industry, have traditionally engaged in local collective bargaining that results in agreements binding not only on the electrical contractors who are their members, but also on contractors who are not members. (Those nonmember contractors will be referred to hereafter as non-NECA contractors.) This result comes about through the use of so-called "assents," which are short-form labor agreements by which the signatories bind themselves to the results of the employer association's bargaining.²

The ability of non-NECA contractors to take advantage, through the assent system, of local NECA-IBEW labor agreements is of great value to them since they can thereby rely on a ready pool of employees bound by agreements painstakingly negotiated by NECA chapters and the IBEW locals; they can bid confidently on projected work in reliance on wage rates and other cost terms which are fixed by the local labor agreement uniformly as to all affected contractors; they can rely on the ability to hire electricians who are trained in the apprenticeship and advanced programs operated jointly by NECA and the IBEW; and they can rely on the resolution of labor disputes by the processes and organizations operated by

² In the electrical construction industry, there are three types of assents: The Letter of Assent "A", by which a contractor designates a local chapter of NECA to be its bargaining agent with an IBEW local union on an ongoing basis until timely termination, and adopts the existing local labor agreement; The Letter of Assent "B", by which a nonmember contractor agrees to abide by all terms of a specified local NECA-IBEW agreement, and all amendments thereto, and all successor agreements, until such time as the assent is cancelled by timely notice; and the International Agreement, a short-form agreement occasionally entered into by the International President of the IBEW with certain national "traveling" contractors who consistently operate in the jurisdictions of many IBEW locals. International Agreements have the same general effect as Letters of Assent "B" (A. 4a-5a).

NECA and the IBEW. Historically non-NECA contractors secured these advantages without paying any of the costs.

If non-NECA contractors do not desire to adopt the NECA-IBEW agreement, they are free to negotiate their own independent agreements with the IBEW locals (R. 782-5, 1365-1556). However, those contractors rarely choose to do so (A. 5a).

In 1975, the International President of the IBEW and the National President of NECA entered into negotiations looking toward the establishment of a national labor agreement which would bind their respective members, and would also bind assenting non-NECA contractors by being incorporated into local NECA collective bargaining agreements. The IBEW initiated the negotiations to obtain a nationwide increase in employer contributions to the nationally established pension fund for employees covered by IBEW agreements. In response, NECA demanded and obtained several concessions, including a favorable journeyman-to-apprentice ratio on construction jobs nationwide, a nationally standardized clause permitting the employment of electricians on a multi-shift basis with shift premiums rather than overtime payments, and a uniform management's rights clause (A. 5a).

NECA also proposed the creation of a National Electrical Industry Fund ("NEIF") and the insertion of a clause in local collective bargaining agreements whereby each employer party would pay up to one percent of his electrical labor payroll to the fund. This fund was patterned after comparable "industry funds" contained in thousands of construction industry labor contracts (R. 2241). One of its major purposes was to alleviate the burden on NECA's members caused by the prevalence of free riders—viz., non-NECA contractors who benefit from NECA's services by assenting to local NECA-IBEW agreements. The fund was to be used to defray the costs of NECA's collective bargaining and administration of labor agreements, to provide support

for training of IBEW workers and for promotional efforts on the part of the electrical construction industry, which served the union's interest in preserving work opportunities for its members.³ The contributions, to be determined by local bargaining, ranged from .2% to 1% of gross labor payroll; .2% was to be forwarded to NECA national headquarters for financing national NECA services and the balance of the contribution was retained by the local chapters for local services (A. 6a, n.5).

These proposals were ultimately adopted by the parties as the National Agreement. Its first paragraph states:

The appropriate contents of this agreement and the enabling clauses herein shall be inserted in all agreements between the parties [the IBEW and NECA] and in all construction agreements between the local unions of the IBEW and the local chapters of NECA.

Provision for the NEIF was made in Article Six:

The parties agree to the establishment of a legally constituted trust to be called the National Electrical Industry Fund.

All construction agreements in the electrical industry shall contain the following language:

"Each individual employer shall contribute one percent (1%)* of the gross labor payroll to be forwarded monthly to the National Electrical Industry Fund in a form and manner prescribed by the trustees no later than fifteen (15) calen-

³ The Declaration of Trust for the NEIF limited expenditures to paying costs incurred by NECA in collective bargaining; paying expenses of employer representatives on the Council on Industrial Relations and NECA's costs in operating it as a forum to resolve industry labor disputes; providing training programs; providing other mutually beneficial services such as educational research, safety improvement programs and programs directed at promoting sound industry labor relations; advertising to promote work within the industry; and paying NECA's operating costs and expenses in the "administration and carrying out of the purposes" set forth above (R. 1655).

dar days following the last day of the month in which the labor was performed. Failure to do so will be considered a breach of this agreement on the part of the individual employer" * (an amount not to exceed 1% nor less than 0.2 of 1%, as determined by each local chapter and approved by the trustees) (A. 5a-6a).⁴

The National Agreement was approved in December, 1976 to become operational on July 1, 1977. In the intervening period all then-existing local NECA-IBEW labor agreements were modified by the local parties to contain all of the nationally negotiated terms, including the NEIF provision (R. 729; 780). Thus, by the Spring of 1977, all NECA contractors, as well as those non-NECA contractors that had assented to the terms of local NECA-IBEW agreements, became bound to make payment into the NEIF beginning as of July, 1977.⁵

⁴ The term, "construction agreements", as used in the first and third paragraphs quoted above is a term of art. It refers to collective bargaining agreements entered into by IBEW local unions in its construction division, as distinguished from its other divisions.

⁵ Non-NECA contractors that had not assented to local NECA contracts were not affected by the new NEIF provisions of those contracts. The IBEW had instructed its locals that they should only request such contractors, by *mutual consent*, to amend their agreements to provide for the NEIF, and that they were not to insist on such amendments (R. 782-85; 1834). The IBEW also instructed its locals that the NEIF provision was not required in new agreements with non-NECA contractors, and that if non-NECA contractors did not desire to assent to local NECA-IBEW agreements, the locals should negotiate in good-faith for alternative agreements that did not contain the NEIF (*Id.*). Numerous non-NECA contractors availed themselves of this option and by October, 1979, some 832 agreements with non-NECA contractors had been negotiated which did not contain the requirement of payment into the NEIF (R. 1560). However, the majority of non-NECA contractors continued to assent to local NECA-IBEW agreements.

B. Proceedings Below

In August, 1977, the National Constructors Associations ("NCA"), fourteen of its members, and an electrical contractor which was not a member of NCA, brought this action in the United States District Court for the District of Maryland. On September 9, 1980, the district court certified a plaintiff class consisting of approximately 800 non-NECA electrical contractors. On the same date, in response to cross-motions for summary judgment, the district court determined that Article Six of the National Agreement constituted "price fixing" and was illegal *per se* under § 1 of the Sherman Act. Invoking § 16 of the Clayton Act, the court enjoined further collection of NEIF payments from non-NECA contractors, whether or not they had assented to the contracts requiring such payments. The summary judgment was affirmed on May 17, 1982, by a two-judge majority of the United States Court of Appeals for the Fourth Circuit, consisting of Circuit Judge Widener and District Judge Michael, sitting by designation.* Circuit Judge Hall dissented, declaring that the majority's "blind ap-

* The panel majority made a threshold factual finding that the indisputable meaning of Article Six was that the NEIF was required to be included "in all IBEW electrical construction contracts at issue here" (A. 9a). This finding was made despite clear evidence that the IBEW locals had entered into hundreds of agreements which did not include the NEIF, see p. 7, n.5, *supra*, and NLRB decisions rejecting charges (brought by NCA and other plaintiffs) that locals had insisted on the inclusion of provisions for such payment:

On October 7, 1977, NCA filed unfair labor practice charges against IBEW and twenty-three of its local unions, under §§ 8(b)(1)(B) & 8(b)(3) of the National Labor Relations Act, as amended, claiming that, pursuant to the National Agreement, the union had agreed to impose a nonmandatory subject of bargaining—NEIF payments—on all contractors in the electrical construction industry (R. 1657). After an extensive investigation of the union's conduct, the General Counsel of the NLRB refused to issue any charge based upon the agreement. The General Counsel's Office of Appeals upheld the decision, noting that "the International's policy at all times was to

plication of the *per se* rule against price-fixing . . . ignores the realities of this case, and as a consequence, reaches a manifestly inequitable result" (A. 20a).

REASONS FOR GRANTING THE WRIT

Introduction

In this case the court of appeals ruled: first, that a provision in the NECA-IBEW national multiemployer collective bargaining agreement should be read as requiring the inclusion in all IBEW construction industry collective agreements of a provision for a fund (the NEIF) established to pay the costs of the multiemployer collective bargaining negotiations, contract administration, apprenticeship training, and other related activity; and, second, that this agreement to secure such further agreements is price fixing *per se* illegal under the antitrust laws. The court of appeals theorized that a purpose of the antitrust laws, in general, and the *per se* rule against price fixing, in particular, is to preserve a "competitive advantage" (A. 15a) enjoyed by one group of competitors over another group of competitors in the same market by

request, rather than insist, that the Industry Fund be included during negotiations with non-NECA contractors" (R. 1667).

The only charges that went to trial were against two local unions. These were consolidated before an Administrative Law Judge, who dismissed them after finding that the unions were not "unwilling to engage in good-faith bargaining for a contract without the NEIF" *IBEW Local Union No. 527* and *IBEW Local Union No. 716*, Case Nos. 23-CB-2075, 23-CB-2074 at p. 11 (May 31, 1979) (R. 1673). The charging party, NCA, filed no appeal.

Another complaint was filed against IBEW Local No. 12 by a union member who claimed that the union had unlawfully engaged in a strike and picketing because the employer had refused to accept the NEIF and that he had been unlawfully fined for continuing to work during the strike. The Administrative Law Judge found that the union was willing to bargain for a separate contract without the NEIF and dismissed the complaint. The NLRB adopted that decision as its own. *IBEW Local No. 12 (Commonwealth Electric Co.)*, 252 NLRB 245 (Sept. 18, 1980).

reason of the fact that both groups take advantage of a unique service performed by a trade association, but only the latter pays the cost of providing that service while the former takes a "free ride."

A salient feature of this Court's antitrust jurisprudence from *Continental T.V. Inc. v. GTE. Sylvania, Inc.*, 433 U.S. 36 ("*GTE Sylvania*") to *Arizona v. Maricopa County Medical Society*, 102 S. Ct. 2466 (June 18, 1952) ("*Maricopa*") has been a thoroughgoing review of the comparative costs and benefits of testing challenged practices by *per se* rules of illegality or by the rule of reason. As those decisions show, no antitrust question is of greater moment than the question of the proper scope to be accorded to each of these methods of analysis. *Maricopa* shows, too, that while there is much that is in dispute in this regard, there is also unanimous agreement that, where there "is price fixing only in a 'literal sense'" the *per se* rule against price fixing is not applicable. (*Id.* at 2479 quoting *Broadcast Music Inc. v. Columbia Broadcasting Systems, Inc.*, 441 U.S. 1 ("*CBS*"); compare 102 S. Ct. at 2482-2483, Powell, J., dissenting). And it is beyond dispute that this Court's admonition that the utmost care be taken in distinguishing between practices that are properly labelled price fixing illegal *per se* and practices subject to the more discriminating analysis of the rule of reason is especially vital where the practice must be measured not against the antitrust laws standing alone but against the complex of rules designed to accommodate those laws and the national labor policy favoring collective bargaining. See *H.A. Artists & Associated Actors Equity Ass'n*, 451 U.S. 704, 713-716 (tracing the history of the "labor exemption".)

It is patent that the court of appeals in issuing the decision below proceeded in disregard of the leadings of this Court. That court committed all of the following errors in reaching its conclusion:

First, in its haste to affix the "price fixing" label to the provision challenged here, the court of appeals did

not pause even for a moment to undertake the critical analysis called for in *CBS* and *Maricopa*, that requires distinguishing between practices which only "literally 'fix[]' a 'price'" and those "certain categories of business behavior to which the *per se* rule has been held applicable" (441 U.S. at 9).

Second, that court ignored the rule settled since *United States v. Addyston Pipe & Steel Co.*, 85 Fed. 271 (C.A. 6, 1898), *aff'd*, 175 U.S. 211 (1899) ("*Addyston Pipe*") and reaffirmed once again in *Maricopa* (102 S. Ct. at 2479-2480) that a single entity—whether a joint venture, a trade association or some other similar organization—that creates a unique product or provides a unique service may, without violating the antitrust laws, establish a uniform price for that product or service.

Third, that court, contrary to this Court's reasoning in *GTE Sylvania*, 433 U.S. at 55, treated the purpose of attempting to eliminate a "free-rider" effect as a purely anticompetitive purpose of the type subject to invalidation *per se*, rather than as a purpose to further the aims of the antitrust laws by alleviating the effects of a market imperfection, a purpose which justifies rule-of-reason analysis.

Fourth, that court, contrary to this Court's teaching in *GTE Sylvania*, 433 U.S. at 58-59, engaged in "formalistic line drawing" by differentiating between two practices indistinguishable in their economic effect: An association charging its members for a unique service produced by the association (which the lower court in its order treated as lawful) and an association charging the same price to nonmembers for the same service (which the lower court in its order enjoined as price fixing illegal *per se*).

Fifth, the court, contrary to the reasoning of *Hanover Shoe v. United Shoe Machinery*, 392 U.S. 481, indulged the assumption that, if a practice creates an added cost for certain competitors, that cost is automatically passed

on by each of those competitors in setting its own price for the sale of its product; on that patently false assumption the court of appeals held that such a practice tends to stabilize the prices charged by the competitors and is a form of price fixing illegal *per se*.

Sixth, that court, contrary to this Court's rulings in *Apex Hosiery Co. v. Leader*, 310 U.S. 469 and *Mine Workers v. Pennington*, 381 U.S. 657, treated a multi-employer collective bargaining agreement provision that the union will seek the same collective bargaining agreement from all employers, as price fixing illegal *per se*, rather than as a provision that loses the "nonstatutory" labor exemption *if and only if* it is shown to be part of a conspiracy to drive certain competing employers out of a commercial market.

Finally, that court, contrary to *Charles D. Bonanno Linen Service, Inc. v. NLRB*, 454 U.S. 404, and its predecessors, which recognize that the labor law favors the stabilization of multiemployer bargaining relationships, improperly applied the antitrust laws to excuse certain members of a multiemployer bargaining unit from the obligation to comply with terms of the collective bargaining agreement covering that unit.

These are not small errors, nor do they produce only the isolated effect of an erroneous judgment in this case. Looking at this case solely from the antitrust perspective, the court of appeals' decision radically expands the class of practices subject to invalidation under the *per se* doctrine and correspondingly narrows the class of practices subject to rule-of-reason analysis. That result is fundamentally inconsistent with this Court's recognition that "the rule of reason [is] the standard traditionally applied for the majority of anticompetitive practices challenged under § 1 of the Act" (*GTE Sylvania*, 433 U.S. at 59). And, as we noted at the outset, this expansion is accomplished by uncritically applying the label "price fixing" to the practice challenged here—not to further free competition in the classical sense, but to maintain a "free-

“rider” effect that benefits one group of *competitors* in a market. This evinces a total misunderstanding of the purposes of the antitrust laws. As the Court stressed in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488: “The antitrust laws, however, were enacted for ‘the protection of *competition*, not *competitors*,’ *Brown Shoe Co. v. United States*, 370 U.S. [294] at 320” (emphasis in original).

Moreover, this case is not one in which the legality of the challenged practice is to be judged solely by measuring that practice against the norms stated in the antitrust laws. The agreement invalidated in part here is a multiemployer collective bargaining agreement. Every decision of this Court from *Apeex Hosiery* to the present demonstrates that the agreement, insofar as it sets the price for labor to be paid by electrical contractors who are within that bargaining unit, is within the labor exemption to the antitrust laws and not illegal *per se* under those laws. And, to the extent that the decision below turned on the effect of the NECA-IBEW collective agreement outside the covered bargaining unit, *Pennington* shows that such effects standing alone are not sufficient to remove the labor exemption. Thus, viewed in this broader context of the proper accommodation of the antitrust and labor laws, the decision below is even more incompatible with the principles established by this Court.

I. The Decision Below That Petitioners Engaged in “Price Fixing” Which *Per Se* Violates the Sherman Act Is Fundamentally Inconsistent With the Decisions of This Court

A. The courts below decided this case on the theory that Article Six of the NECA/IBEW agreement (as they construed it) is a price-fixing agreement *per se* illegal under § 1 of the Sherman Act. This conclusion was fundamental error as shown by the analysis of the *per se* concept in *CBS* and *Maricopa*.

In *CBS*, the Court of Appeals for the Second Circuit had held that issuance by two organizations (ASCAP and BMI) to CBS of blanket licenses to copyrighted musical compositions at fees negotiated by those parties was price fixing *per se* unlawful under the antitrust laws (see 441 U.S. at 4, 6). This Court disagreed with that conclusion. Observing that "easy labels do not always supply ready answers" (*id.* at 8), the Court's opinion emphatically rejected the court of appeals' analysis of the issue:

To the Court of Appeals and CBS, the blanket license involves "price fixing" in the literal sense: the composers and publishing houses have joined together into an organization that sets its price for the blanket license it sells. But this is not a question simply of determining whether two or more potential competitors have literally "fixed" a "price." As generally used in the antitrust field, "price fixing" is a short-hand way of describing certain categories of business behavior to which the *per se* rule has been held applicable. The Court of Appeals' literal approach does not alone establish that this particular practice is one of those types or that it is "plainly anticompetitive" and very likely without "redeeming virtue." Literalness is overly simplistic and often overbroad. When two partners set the price of their goods or services they are literally "price fixing," but they are not *per se* in violation of the Sherman Act. See *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 280 (CA6 1898), *aff'd*, 175 U.S. 211 (1899). Thus, it is necessary to characterize the challenged conduct as falling within or without that category of behavior to which we apply the label "*per se* price fixing." That will often, but not always, be a simple matter. [441 U.S. at 8-9, footnotes omitted]

As a result of this examination of the blanket licensing practice the Court concluded that the practice did not fall within the category to which the label *per se* "price fix-

ing" should apply and directed it be evaluated under the rule of reason (441 U.S. at 10-25).⁷

In *Maricopa* the question presented was "whether § 1 of the Sherman Act, . . . has been violated by an agreement among competing physicians setting, by majority vote, the maximum fees that they may claim in full payment for health services provided to policy-holders of specified insurance plans" (102 S. Ct. at 2469). Each of the two defendant medical societies had established a foundation, composed of doctors, to "perform[] three primary activities":

It establishes the schedule of maximum fees that participating doctors agree to accept as payment in

⁷ In *Addyston Pipe & Steel*, the *locus classicus* cited in *CBS*, Judge (later Chief Justice) Taft wrote as follows concerning the common law, whose concept of restraint of trade was read into the Sherman Act:

. . . [W]hen two men became partners in a business although their union might reduce competition, this effect was only an incident to the main purpose of a union of their capital, enterprise, and energy to carry on a successful business, and one useful to the community. Restrictions in the articles of partnership upon the business activity of the members with a view of securing their entire effort in the common enterprise, were of course, only ancillary to the main end of the union, and were to be encouraged. [85 Fed. at 280]

But in contrast Judge Taft also wrote:

[W]here the sole object of both parties in making the contract as expressed therein is merely to restrain competition, and enhance or maintain prices, it would seem that there was nothing to justify or excuse the restraint, that it would necessarily have a tendency to monopoly, and therefore would be void. In such a case there is no measure of what is necessary to the protection of either party, except the vague and varying opinion of judges as to how much, on principles of political economy, men ought to be allowed to restrain competition. There is in such contracts no main lawful purpose, to subserve which partial restraint is permitted, and by which its reasonableness is measured, but the sole object is to restrain trade in order to avoid the competition which it has always been the policy of the common law to foster. [85 Fed. at 282-283]

full for services performed for patients insured under plans approved by the foundation. It reviews the medical necessity and appropriateness of treatment provided by its members to such insured persons. It is authorized to draw checks on insurance company accounts to pay doctors for services performed for covered patients. [102 S.Ct. at 2470-2471]

The antitrust suit did not challenge the foundation's "peer review or claim administration functions," and the foundation did *not* "allege that these two activities make it necessary for them to engage in the practice of establishing maximum fee schedules." (*Id.* at 2471). The Court held that the agreement to set maximum fees constituted a classic restraint by competitors on the prices that each would charge for his services, and was thus subject to the *per se* prohibition against price fixing. The Court "declined the [defendants'] invitation to cut back on the *per se* rule against price fixing" and then turned to their argument, based on *CBS*, "that their fee schedules involved price fixing in only a literal sense." (*Id.* at 2479.) The Court's response reaffirmed *CBS*' disapproval of a literalistic approach to price fixing and differentiated between *CBS* and *Maricopa* on grounds which compel the conclusion that the *per se* rule is inapplicable here.

The *Maricopa* opinion explained that the "blanket license" in *CBS* was entirely different from the product that any one composer was able to sell by himself" and a "necessary consequence" of its creation "was that a price had to be established" (*id.*, quoting 441 U.S. at 21). Thus, "the delegation by the composers to ASCAP of the power to fix the price for the blanket license was not a species of the price-fixing agreements categorically forbidden by the Sherman Act. The record disclosed price fixing only in a 'literal sense.'" (*Id.*, quoting 441 U.S. at 8.) But the agreement in the *Maricopa* case was found to be "fundamentally different":

Each of the [defendant] foundations is composed of individual practitioners who compete with one another for patients. * * * The members of the foundations sell medical services. Their combination in the form of the foundation does not permit them to sell any different product. Their combination has merely permitted them to sell their services to certain customers at fixed prices and arguably to affect the prevailing market price of medical care. [102 S.Ct. at 2479]

The difference between agreements such as that in *CBS* on the one hand, and agreements by which competitors combine to fix the prices of their own services as in *Maricopa* is, as this Court demonstrated in the last paragraph of the latter opinion, basic to antitrust law. The Court distinguished "partnerships or other joint arrangements in which persons who would otherwise be competitors pool their capital and share the risks of loss and profit" and which are "regarded as a single firm competing with other sellers in the market" from the *Maricopa* agreement among "hundreds of competing doctors concerning the price at which each will offer his own services to a substantial number of consumers." (102 S. Ct. at 2479-2480). The Court concluded:

[I]f a clinic offered complete medical coverage for a flat fee, the cooperating doctors would have the type of partnership arrangement in which a price fixing agreement among the doctors would be perfectly proper. But the fee agreements disclosed by the record in this case are among independent competing entrepreneurs. They fit squarely into the horizontal price fixing mold. [Id. at 2480] *

An agreement which provides that all contractors shall pay a specified amount to the NEIF is indistinguishable from that in *CBS*, and bears no resemblance to the horizontal price-fixing cartel in *Maricopa*. The services of NECA and its chapters for which that payment is

* See also *Addyston Pipe & Steel*, quoted at p. 15, n.7, *supra*.

made are as unique as the blanket licenses. No single contractor, be it a member or nonmember of NECA can bargain with IBEW on a multiemployer basis, or administer the resulting multiemployer agreements, or operate the resulting multiemployer apprenticeship and advanced training programs together with IBEW and its locals as provided in those agreements. While electrical contractors, be they members or nonmembers of NECA, compete with each other in the market for the sale of their construction services, the IBEW/NECA agreement by its terms does not establish the price of those services.

B. The courts below have not determined that the services performed by NECA are illegal, or that nonmembers of NECA do not benefit from those services. And it is clear that these services cannot be performed unless the costs are borne by someone.* Those courts have held, rather, that the antitrust laws require that non-NECA contractors be relieved of those costs, which are to be borne exclusively by NECA contractors. But the elimination of "free-rider" effects, which the courts below regarded as an anticompetitive purpose, calling for *per se* invalidation of the 1% contribution, was considered by this Court to be one of the justifications for the restraint at issue in *GTE Sylvania*, where the *per se* doctrine of *U.S. v. Arnold Schwinn & Co.*, 388 U.S. 365, was disapproved.

Precisely because free-rider situations reflect a "market imperfection[]" (433 U.S. at 55) rather than the proper workings of competitive markets, the Seventh Circuit recently observed that "antitrust law increasingly is tolerant of contractual arrangements that reduce free-

* In this respect, too, the circumstances of the present case differ from those in *Maricopa* where it was undisputed that the defendant foundations could carry on their lawful peer review and claim administration functions without establishing maximum fee schedules (102 S. Ct. at 2471).

rider problems and thereby increase competition * * *. See, e.g., *United States Trotting Ass'n v. Chicago Downs Ass'n Inc.*, 665 F.2d 781, 789 (C.A. 7 1981) (*en banc*)¹⁰;

¹⁰ The *United States Trotting Ass'n* case is especially instructive. The Association ("USTA"), whose members included, *inter alia*, race tracks and horse owners, registered standardbred horses, maintained records of registration certificates and provided eligibility certificates for use in selecting balanced race fields. Nonmembers of USTA could obtain such certificates by affiliating as "contract tracks" and paying to use USTA's services on the same basis as member tracks (see 665 F.2d at 783-784). Two race tracks, which neither joined USTA nor contracted to buy its services,

continued to hold races with USTA-registered horses and to use the information contained on USTA registration and eligibility certificates. Both continued to provide USTA with information about racing performances by forwarding Judge's Sheets to USTA headquarters. Each of the defendants thus enjoyed a paradigmatic "free ride," receiving all of the benefits of USTA affiliation with none of the attendant costs. [665 F.2d at 784]

USTA then informed its members of its intention to invoke certain sanctions against the nonpaying tracks, whereby it would provide no services to them and would enforce USTA's rules which forbade its members from racing horses at those tracks (665 F.2d at 784-785). One of the nonpaying tracks asserted that the enforcement of those rules would be a group boycott *per se* violative of § 1 of the Sherman Act, and the district court agreed, permanently enjoining USTA from "preventing its members from racing at tracks which are not USTA members or have not paid USTA a specified fee." (*Id.* at 787, quoting 487 F. Supp. 1008, 1017). The court of appeals, sitting *en banc*, reversed. In rejecting *per se* treatment that court reasoned:

Except in the rare instances where conduct is unambiguously anticompetitive, [our] lack of experience should lead us to inquire into the nature and idiosyncracies of a particular enterprise before we assign a label to its conduct. One indication of the inconcinnity between the state of our knowledge and the certitude of the *per se* rule is the extent to which the rule minimizes USTA's free-rider problems. If Fox Valley can enjoy the benefits of affiliation with USTA and pay nothing, or pay only when a court orders it to do so, it has no incentive to do otherwise. And it can count on the breadth of USTA membership and on the relationship between USTA and state

Muenster Butane Inc. v. Stewart Co., 651 F.2d 292, 297 (C.A. 5 1981).” *USM Corp. v. SPS Technologies, Inc.*, CCH 1982-83 Trade Cases ¶ 65,077 (C.A. 7, December 3, 1982). See also *Davis-Watkins Co. v. Service Merchandise*, 686 F.2d 1190, 1200-1201 (C.A. 6, 1982).

Indeed, it has long been settled that even an association which has violated the Sherman Act by excluding competitors from a beneficial arrangement may lawfully condition the competitors' participation on their payment of a fair share of the cost of the service. *United States v. St. Louis Terminal Railroad Association*, 224 U.S. 383. See also *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1386-1387 (C.A. 5). And, as we have seen, in *U.S. Trotting Ass'n*, the Seventh Circuit approved the imposition of a fee on nonmembership of an association for service performed by the association from which the nonmembers also benefited. Yet, while the latter case explicitly, and in *St. Louis Terminal* and its progeny implicitly, have recognized the equity and antitrust legality of eliminating free riding by nonmembers of an association, the courts below have held that the antitrust laws require that NECA give nonmembers a free ride.

GTE Sylvania rests on the more general proposition “that departure from the rule-of-reason standard must be based upon demonstrable economic effect rather than—as in *Schwinn*—upon formalistic line drawing.” (433 U.S. at 58-59.) In deciding the present case, the court below engaged in just such “formalistic line drawing” as was disapproved in *GTE Sylvania*. The injunction entered by the District Court, and affirmed in this respect by the Court of Appeals, enjoined the defendants from applying “Article 6 of the National Agreement . . . as to any per-

racing boards to keep USTA afloat for some time despite its (and other tracks') free-riding attempts. In treating USTA's efforts to forestall this result as *per se* violative of the Sherman Act, the district court forecloses all justifications USTA might make, perhaps without achieving any procompetitive result. [665 F.2d at 789, footnotes omitted]

son, corporation, or other entity which is not a member of the National Electrical Contractors Association" and from "demanding, soliciting, collecting or receiving from any person, corporation or entity which is not a member of the National Electrical Contractors Association contributions to the National Electrical Industry Fund" (A. 17a). Drawing a line between competitors operating in a single market on the basis of their membership or nonmembership in an association makes no more sense in terms of the purposes of the antitrust laws than did the *Schwinn* distinction between transactions in which title passes and those in which title does not pass.¹¹

C. The courts below rested their determination of *per se* illegality on the ground that, in the court of appeals'

¹¹ In sustaining the injunction with respect to all non-NECA contractors, even if they voluntarily agreed to contribute to the NEIF, the court misapplied and misunderstood yet another antitrust precedent—*Perma Mufflers v. Int'l Parts Corp.*, 392 U.S. 134. The court of appeals reasoned that "to deny non-NECA employers relief although they may have previously voluntarily assented to a NECA-IBEW agreement would be to deny recovery to a party which was *in pari delicto*, contrary to the holding in *Perma Life*" (17a-18a). The court thereby misconstrued the significance of the voluntariness of non-NECA contractors' action in assenting. Such voluntary action does not, we recognize, preclude recovery by assenting contractors on the equitable grounds addressed and disallowed in *Perma Life*. Rather, such voluntariness demonstrates the lack of any injury or threatened injury flowing from Article Six of the National Agreement. For, if the purported illegality of Article Six inheres in its requiring NEIF language in the local labor contracts of nonmembers of NECA (A. 9a) and its "rob[bing] them of a competitive advantage" (A. 15a) (our emphasis), relief should be extended only insofar as such contractors have been or will be "required" and "robbed", and not insofar as they voluntarily have agreed—or will agree—to adopt local labor contracts including NEIF provisions. Prohibiting the maintenance of the NEIF provisions in local labor agreements of all non-NECA contractors would only be justified if the NEIF were in and of itself illegal, which the courts below have not held, or if there were evidence, which there is not, that those local agreements were, in fact, adopted as a result of coercion.

pejorative description, "taking the additional 1% of labor costs from non-NECA contractors * * * robs them of a competitive advantage beneficial to the public." (A. 15a)

Such rhetoric is an insufficient substitute for the thoughtful analysis of a challenged practice required by this Court's decisions. Even if it were proper to assume that the agreement has adverse effects on competition in the market for electrical services (and we shall show that it may not be so assumed), the agreement would not necessarily be subject to *per se* invalidation.

As the Court recently explained, the earliest of cases applying the rule of reason upheld a covenant by a seller of a bakery not to compete with a purchaser of his business "as reasonable, *even though it deprived the public of the benefit of potential competition.*" *National Soc. of Professional Engineers v. U.S.*, 435 U.S. 679, 688-689 (emphasis added), discussing *Mitchel v. Reynolds*, 1 P. Wms. 181, 24 Eng. Rep. 347 (1711).¹²

Of course, as the *Professional Engineers* case also teaches (and *Maricopa* reaffirms), the rule of reason does not apply to an agreement among "competitors * * * to sell their goods at the same price as long as their price is reasonable." (435 U.S. at 689). However, the courts below did not and could not construe the IBEW-NECA agreement as one which by its terms fixes the price at which the competing electrical contractors would sell electrical construction services. Rather, those courts

¹² In *Mitchel* the "long-run benefit of enhancing the marketability of the business itself * * * outweighed the temporary and limited loss of competition" (435 U.S. at 689). So too, although the necessary effect of any agreement which denies to one or more competitors a free ride at the expense of other competitors is to eliminate the competitive advantage which the former would enjoy if they could avoid the cost of paying for the service, it has generally been understood that "contractual arrangements [which] reduce free-rider problems * * * increase competition" (*USM Corp.*, quoted at pp. 18-19, *supra*).

determined, again in the court of appeals' words, that the "industry fund would tend to stabilize the price of electrical construction contracts, a practice illegal *per se* under the Sherman Act" (A. 15a-16a).

But the conclusion that the agreement would have the tendency to stabilize prices in the electrical construction market is fundamentally flawed. Since the case was decided on summary judgment, without any evidence concerning the operations of the market for electrical construction services, the "tendency to stabilize" conclusion necessarily rests on the unarticulated premise that a change in costs at one level is necessarily reflected in a change in price at the next level. Precisely that theory was deemed fallacious by this Court when it rejected the passing-on defense in Sherman Act suits:

We are not impressed with the argument that sound laws of economics require recognizing this defense. A wide range of factors influence a company's pricing policies. Normally the impact of a single change in the relevant conditions cannot be measured after the fact; indeed a businessman may be unable to state whether, had one fact been different (a single supply less expensive, general economic conditions more buoyant, or the labor market tighter, for example), he would have chosen a different price. [*Hanover Shoe v. United Shoe Machinery Co.*, 392 U.S. 481, 492-493] ¹³

D. In sum, the simplistic approach of the courts below, which equates eliminating a cost differentiation between competitors and price-fixing in the market in which those competitors sell their products, is bad economics and bad law.

¹³ It may be that a trial would show that in some or all segments of the market for electrical construction services "the additional 1% labor costs" (A. 15a) are automatically passed on to the purchaser of those services rather than absorbed by the contractor. In such a situation, the "'cost-plus' contract" exception recognized in *Hanover Shoe* (392 U.S. at 494) would be applicable to any damage claim.

We cannot identify all the economically useful practices which are jeopardized by the court of appeals' analytical leap to the proposition that cost equalization is price fixing illegal *per se*. But the effect of the decision is brought into focus by noting that the following decisions, previously discussed in this section, would have different results under the court of appeals' rationale: *CBS* would certainly have to be decided differently, because the blanket license which was there sustained established the cost of all those who wished to use the musical compositions. That cost (which *CBS* sought to lower by the litigation) undoubtedly had an impact on the price which *CBS* and competing networks charged for advertising on programs in which such music was used. Moreover, under the court of appeals' approach, the defendant in *U.S. Trotting Ass'n.* would not have been able to continue to charge non-member racetracks for the use of its services (see pp. 19-20, n.10, *supra*). Indeed, all arrangements which seek to remedy the "free-rider" problem by imposing a uniform cost on competitors would be illegal *per se* under the court of appeals' theory. Consequently, the practice which the decrees in cases such as *St. Louis Terminal Co.* and *Realty Multi-List* (p. 20, *supra*) expressly permitted, and which the Justice Department in the latter case successfully proposed as the remedy for the defendant Brokers' Association's illegal boycott (see 629 F.2d at 1359, n.17, and 1360), would be forbidden.

II. The Decision Below Is Inconsistent With the Decisions of This and Other Courts Concerning the Interrelationship Between the Antitrust Laws and the Labor Laws, and Would Undermine the Congressional Decision to Preserve Multiemployer Bargaining

A. To this point we have accepted the hypothesis that this is a case concerning the antitrust rules that govern commercial markets. In fact, however, this case concerns a labor market price set for the work done by workers covered by the local NECA-IBEW multiemployer collective bargaining agreements after the give and take be-

tween the parties that is part and parcel of the bargaining process. It has been settled since *Apex Hosiery Co. v. Leader*, 310 U.S. 469, that, far from constituting a *per se* antitrust violation, a collective bargaining agreement fixing that price is within the "nonstatutory" exemption to the antitrust laws. This Court most recently restated the law in this regard in *Connell Co. v. Plumbers & Steamfitters*, 421 U.S. 616, 622:

The nonstatutory exemption has its source in the strong labor policy favoring the association of employees to eliminate competition over wages and working conditions. Union success in organizing workers and standardizing wages ultimately will affect price competition among employers, but the goals of federal labor law never could be achieved if this effect on business competition were held a violation of the antitrust laws.

The Court has, to be sure, recognized one limit on the freedom to negotiate the price of labor through collective bargaining:

One group of employers may not conspire to eliminate competitors from the industry and the union is liable with the employers if it becomes a party to the conspiracy. This is true even though the union's part in the scheme is an undertaking to secure the same wages, hours or other conditions of employment from the remaining employers in the industry. [*Mine Workers v. Pennington*, 381 U.S. 657, 665-666]

Aside from the instant decision, the uniform understanding of the *Pennington* rule in the courts of appeals is that stated in *James Snyder Co. v. Associated Gen. Contr. Etc.*, 677 F.2d 1111 (C.A. 6) *cert. denied*, — U.S. —, 51 L.W. 3378 (Nov. 15, 1982). In their complaint in that case "plaintiffs alleged that defendants had conspired with the bricklayers' and laborers' unions to impose the multi-trade/multi-employer collective bargaining agreement's terms upon smaller non-signatory employers in an attempt to drive them out of business in violation of sec-

tion 1 of the Sherman Act" (677 F.2d at 1118). After a painstaking analysis of the decisions of this Court and of the other courts of appeals, the Sixth Circuit held "that plaintiffs in the present case had the burden of proving first that defendants and unions agreed to impose wages upon plaintiffs, and second that defendants entered into this agreement with the intent to injure the plaintiffs' businesses, i.e., with predatory intent" (677 F.2d at 1120).

The Fifth and Seventh Circuits have also held that proof that the union was motivated by a predatory intent is a necessary element for making out a *Pennington* claim. *Embry-Riddle Aeronautical University v. Ross Aviation, Inc.*, 504 F.2d 896, 903 (C.A. 5); *Associated Milk Dealers, Inc. v. Milk Drivers' Local 753*, 422 F.2d 546, 554 (C.A. 7).

The courts below denied petitioners the benefit of the labor exemption without a trial and without making this requisite finding of predatory intent. And, of course, a plaintiff who shows that intent has not proved a *per se* antitrust violation, but only that the nonstatutory exemption does not apply. "[I]t is clear that denying the exemption does not mean that there is an antitrust violation," *Federal Maritime Commission v. Pacific Maritime Association*, 435 U.S. 40, 61. See also *Connell Co.*, *supra*, 421 U.S. at 637; *National Gerimedical Hospital v. Blue Cross*, 452 U.S. 378, 393, n.19.

B. The decision below upsets the accommodation which *Pennington* and the decisions of other circuits just cited have made between the policies of the antitrust laws and of the labor laws with respect to multiemployer bargaining not simply in one respect but in two. In *Pennington* the forfeiture of the labor exemption was predicated on the fact that "the union and the employers in one bargaining unit" had "bargain[ed] about the wages, hours and working conditions of other bargaining units" (381 U.S. at 666). But the decision below denied the labor

exemption to an agreement even insofar as the agreement affected members of the multiemployer bargaining unit in which the agreement was made. For that decision relieved members of such a unit from complying with one of the terms their bargaining agent had negotiated and, indeed, enjoined compliance with such terms.¹⁴

This result cannot be squared with Congress' policy, which favors the stability of multiemployer bargaining units. That policy, which appears to underlie *Pennington's* recognition of "the duty to bargain unit by unit", and the aforementioned limitation of its holding to agreements that reach beyond the bargaining unit, was most recently reaffirmed by this Court in *Charles D. Bonanno Linen Service, Inc. v. NLRB*, 454 U.S. 404. The Court there approved the Board's

rules, which reflect an increasing emphasis on the stability of multiemployer units, permit any party to withdraw prior to the date set for negotiation of a new contract or the date on which negotiations actually begin, provided that adequate notice is given. Once negotiations for a new contract have commenced, however, withdrawal is permitted only if there is "mutual consent" or "unusual circumstances" exist. [454 U.S. at 410-411, quoting *Retail Associates, Inc.*, 120 NLRB 388, 395.]

¹⁴ Assent A holders have been expressly found by the NLRB to be members of the local NECA multiemployer bargaining unit, with NECA as their bargaining agent, whether or not they are members of NECA. *McCormick Electrical Construction Co.*, 240 NLRB 418 (1979). Indeed, even the Fourth Circuit acknowledged this to be the law (A. 4a).

Assent B and International Agreement holders, while not giving express ongoing bargaining authority to NECA, confer limited authority for purposes of NECA's negotiating amendments to any existing agreements and are bound by those amendments. Thus, they are functionally members of the unit to that extent. See *Arco Electric Co.*, 237 NLRB 708 (1978), *aff'd*, 618 F.2d 689 (C.A. 10, 1980).

In *Bonanno Linen* the Court reiterated its recognition in *NLRB v. Truck Drivers*, 353 U.S. 87 (*Buffalo Linen*) that

at the time of the debates on the Taft-Hartley amendments, Congress had rejected a proposal to limit or outlaw multiemployer bargaining. The debates and their results offered "cogent evidence that in many industries multiemployer bargaining was a vital factor in the effectuation of the national policy of promoting labor peace through strengthened collective bargaining." [454 U.S. at 409, quoting 353 U.S. at 95]

In Congress, the unsuccessful opponents of multiemployer bargaining had stressed what they considered to be its "monopolistic" nature and adverse effect on competition. See 1 Legislative History of the Labor Management Relations Act 1497 (GPO 1948) pp. 326-327, 672-673, 676, 759-760; 2 *id.*, p. 1492. Congress, however, ultimately rejected these views and instead permitted industrywide bargaining on a voluntary basis while forbidding (in § 8 (b) (1) (B)) labor organizations from coercing employers to join multiemployer or industrywide units, see *NLRB v. Amax Coal Co.*, 453 U.S. 322, 327.

The decision below reverses the congressional judgment. Even if its holding applies only to nonmandatory subjects of bargaining—and the court below refused so to limit its decision (A. 18a)—this holding would seriously undermine the viability of multiemployer bargaining. The prospect that some members of the unit could evade the terms negotiated on behalf of all, and thus obtain a competitive advantage over the others—precisely the policy which the court below, contrary to Congress, sought to further by its decision—would severely inhibit multiemployer negotiations concerning any subject not clearly established to be mandatory. And of course, the fear of treble damage liability would overhang the entire negotiations. Yet, bargaining over permissive subjects is an accepted and useful part of the process, see *Labor Board v. Borg-*

Warner Corp., 356 U.S. 342, 349; *Oil, Chemical and Atomic Workers International Union, Local 3-89 v. NLRB*, 405 F.2d 1111 (CA DC, Burger, J.)

In sum, the decision below (1) is inconsistent with *Pennington*—the major decision of this Court which establishes the scope of the labor exemption to the antitrust laws in the context of multiemployer bargaining, (2) conflicts with the decisions of three other courts of appeals concerning a critical element of proof of a *Pennington* violation; and (3) undermines the multiemployer bargaining process despite Congress' determination to preserve it. A decision of a court of appeals which has such a seriously adverse impact on the national labor policy, and which so sharply departs from precedent and sound analysis under the antitrust laws, should not be permitted to stand.

CONCLUSION

For the foregoing reasons this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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STATUTORY APPENDIX

STATUTES INVOLVED

The Sherman Anti-trust Act, 26 Stat. 209, 15 U.S.C.,
§ 1 *et seq.*, provides in pertinent part as follows:

§ 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: * * *

The Clayton Act, 38 Stat. 730, 15 U.S.C. §§ 12 *et seq.*,
29 U.S.C. § 52, provides in pertinent part as follows:

§ 6. The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

§ 16. Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 2, 3, 7 and 8 of this Act, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction, improvidently granted and a showing that

the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: * * *.

§ 20. No restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall

any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.

The National Labor Relations Act as amended by the Labor Management Relations Act of 1947, 49 Stat. 449, 61 Stat. 136, 29 U.S.C. §§ 141 *et seq.*, provides in pertinent part as follows:

§ 8(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce * * * (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

* * *

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9(a) of the Act;

§ 8(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later

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